

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT L. TOMPKINS,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 193777

Oakland Circuit Court

JUDITH M. TOMPKINS,

LC No. 90-388785

Defendant-Appellee.

Before: Doctoroff, P.J., and Michael J. Kelly, and Young, JJ.

MICHAEL J. KELLY, J. (dissenting).

I respectfully dissent. I believe the trial court's failure to address the circumstances supporting plaintiff's motion for modification of alimony was an abuse of discretion. It certainly would have been appropriate for the trial court to reopen proofs on remand but, more importantly, the court did not revisit the motion for modification after its ruling on remand. The last three paragraphs of the court's January 26, 1996 order states as follows:

In the alternative, plaintiff requests that the court allow plaintiff to seek retroactive modification of the judgment of divorce. The court will deny the request at this time pending the court's ruling on the alimony issue addressed by the Court of Appeals.

Plaintiff's motion to reopen proofs is denied.

It is so ordered.

The majority is persuaded that the plaintiff could have availed himself of the trial court's implied promise to revisit the modification issue without abandoning his appeal. Plaintiff's counsel answers that seeking such an alternative would have resulted in no relief and would have exposed him to assessment of costs. That is a reasonable surmise.

I would remand for hearing on the modification question to determine if a change in circumstances supports modification. If so, I believe such modification should be retroactive as to do otherwise would be inequitable.

/s/ Michael J. Kelly